BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

Opinion of the Court Below

The opinion of the Circuit Court of Appeals is reported in 131 Fed. (2d) 768. It is set forth in the record at pages 51 to 54 and in the appendix *infra* at pages 47 to 51.

B.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 5, 1942 (R. 55). The order denying rehearing was entered on January 27, 1943. (R. 64). The jurisdiction of this Court is invoked under Sections 75(n) and (s) of the Bankruptcy Acts (49 Stat. 942, C. 792; 11 U. S. C. A. Sec. 203); Section 24(c) of the Bankruptcy Act (52 Stat. 854; 11 U. S. C. A. Sec. 47); and Section 240 of the Judicial Code as amended (48 Stat. 926; 28 U. S. C. A. Sec. 347).

C.

Statement of the Case

Respondent purchased from Petitioner 1409 acres of land in Upshur County, Texas on June 30th, 1938 for FIFTEEN THOUSAND ($15,000.00) DOLLARS, THREE HUNDRED ($300.00) DOLLARS cash being paid and a vendor's lien for the remaining FOURTEEN

THOUSAND SEVEN HUNDRED ($14,700.00) DOLLARS being retained in the deed executed by Petitioner. (R. 16).

Under settled Texas law, the retention of a vendor's lien also retains the superior title to the land, and Respondent can only become vested with title upon payment in full of all of the debt, and neither discharge in bankruptcy, nor appraisals in bankruptcy, nor any other fact or circumstance (absent limitation) can effect Petitioner's right to recover the land in the absence of the payment in full of its entire debt.

Respondent repudiated his contract both by injunction against Republic Insurance Company's sale of the land (R. 17), and by filing of petition in bankruptcy (R. 18).

Petitioner, Republic Insurance Company, elected to pursue the remedy given it by Texas law by proceeding in trespass to try title (R. 17-18), a statutory action for trying titles to land. (Revised Civil Statutes of Texas of 1925, Title 124, Article 7364).

Petitioner's debt on March 1st, 1941, was FIFTEEN THOUSAND, NINE HUNDRED and TWENTY DOLLARS and FORTY-THREE CENTS ($15,920.43). The appraisal of Respondent's property was THREE HUNRED and FORTY-FIVE DOLLARS and FIFTY CENTS ($345.50), and of the land here involved, made over Petitioner's objection, was FOURTEEN THOUSAND and NINETY DOLLARS ($14,090.00).

The conciliation commissioner held on the first meeting of the creditors, that there was no reasonable hope of rehabilitation. (R. 18).

The conciliation commissioner dismissed the petition for composition and extension insofar as Petitioner was concerned. (R. 18).

Respondent amended and was adjudged a bankrupt under Section 75 (s) . (R. 18).

Petitioner moved (1) to strike the land involved from the assets, (2) to determine that Petitioner had superior title to the property and permitting it to proceed in the courts of Texas for title and possession, (3) to dismiss Petitioner from the bankruptcy proceeding with its property, and (4) that a trustee be appointed and authorized and required to sell the land at public auction; each of the above being in the alternative. (R. 1-15 inclusive).

After a hearing before the conciliation commissioner, the supervising conciliation commissioner and the District Court, said motion was overruled, the District Court adopting the report and findings of the supervising conciliation commissioner. (R. 21-44 inclusive).

The Circuit Court of Appeals for the Fifth Circuit, on December 5th, 1942, affirmed the judgment of the District Court. (R. 51-55). (Reported as *Republic Insurance Company vs. Butts*, 131 Fed. (2) 768).

The Circuit Court held: (1) that the Texas law as to vendor's liens and superior title did not prevent the at-

tachment of the jurisdiction of the bankruptcy court to the land involved; (2) that the vendor's superior title is "an invention of the Texas law to prevent a purchaser of land owing for it under a vendor's lien from keeping the land without paying for it"; (3) that the holder of a Texas vendor's lien and superior title is in the same position of one who has conveyed title by common law mortgage and that the vendee has such interest in the land as falls within the bankruptcy power under former debtor bankruptcy proceedings; and (4) that Petitioner though held to be a mortgagee, was not entitled to upon its motion duly filed to have the land sold by a trustee appointed by the Court. The opinion of the Circuit Court is set forth in the appendix, at pages 47 to 51.

D.

Assignments of Error

The Circuit Court of Appeals erred:

1. In holding that the three cited Texas cases *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99, which involved a boundary question; *Gray v. Kaliski*, 45 S. W. (2d), 157, involving a case of an original vendor, who had transferred both his vendor's lien and the superior title, being held to have no title subject to execution, and *Yates v. Darby*, 133 Tex. 593, 131 S. W. (2) 95, involving a junior lienholder's rights where the otherwise senior vendor's lien was barred by limitation, governed this case where neither a boundary question, nor a transfer by Petitioner (there had been

none) nor a question of limitation were involved in the face of at least 100 Texas cases cited by Petitioner and without citing or referring to any of the cases cited by Petitioner. (These cases are cited in the Petition for Certiorari pp. 11-12 and in this brief pp. 28 to 32.)

In neither of the Texas cases cited by the Circuit Court was there an action by the holder of the superior title and valid matured debt against the vendee. In no case in Texas has it ever been decided by the Supreme Court that such holder could be defeated in his suit for possession, except by full payment of the debt.

2. The holding that title to land situated in Texas is not controlled and fixed by the law of the State in which the Court is setting.

3. In ignoring the settled law of the State of Texas, the State in which the land was situated, which gives the vendor the superior title and right to the land as against the purchaser until the purchase money is paid, and which permits the holder of the superior title, the vendor, to recover the land unless the full amount of the purchase money is paid.

4. In holding that the vendee may hold the land three years and pay the apparised value when under Texas law such cannot be done.

5. In holding that the Bankruptcy Act and Federal Bankruptcy Courts can take Petitioner's property from it and transfer it to Respondent contrary to the Texas law.

6. In holding that after discharge in bankruptcy the holder of the superior title cannot recover the land, which holding is in conflict with the Texas land law.

7. In holding that Section 75(s) (3) does not permit public sale of the property on request of Petitioner.

8. In refusing to hold that Section 75 (n) and (s) was not within the bankruptcy power of Congress as granted by Article I, Section 8, clause 4 of the Constitution, as it deprived Petitioner of its property without due process of law as guaranteed by the Fifth Amendment of the Constitution and invaded the powers of the State of Texas reserved to it by the Tenth Amendment and ignored the settled Texas law as construed and applied by the Circuit Court.

E.

Argument

1. The Federal Courts are Required to Follow the Texas Law.

De Cordova v. Hood, 84 U. S. 1, 17 Wall. 1, 21 L. Ed. 587 (involving a Texas Vendor's lien); *Slaughter v. Glenn*, 98 U. S. 242, 8 Otto 242, 25 Law Ed. 122, (A Texas case); *Olcott v. Bynum*, 17 Wall. 44, 21 L. Fd. 570; *Davis v. Mason, 1 Peters* 503, 7 L. Ed. 239; *Caldwell v. Carrington*, 9 Peters 86, 9 Law Ed. 60; *Taylor v. Browne*, 5 Cranch 234, L. Ed. 88; *Polk v. Wendel*, 9 Cranch 87, 3 L. Ed. 665; *Erie Railway Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 Law Ed. 1188; *Klaxon Co. v. Stentor E. Mfg. Co.*,

313 U. S. 487, 85 Law Ed. 1477; *J. Rob Griffin v. McCoach*, 313 U. S. 498, 85 L. Ed. 1481 (a Texas case.).

Bankruptcy cases:

Glenn vs. Hollums and Glenn v. Eaves, (C. C. A. 5) 80 Fed. (2d) 555; In re *Braker, Hyde Park Lumber Co. v. West Norwood Bldg. & Loan Co. et al*, (C. C. A. 6) 122 Fed. (2d) 652; *State Bank of Hardingsburg v. Brown*, No. 23, decided Nov. 16, 1942, U. S. Supreme Court.

2. The Texas Rule

Texas is the only state that has exactly the same rule with reference to the rights of a vendor of land who retains a vendor's lien on the property sold. Corpus Juris appear recognizes that this is true. We quote from 66 Corpus Juris 1217, "Vendor and Purchaser", parts of sections 1078 and 1079:——

> "(1078) (b) Texas Rule—aa. Rule stated. In Texas the rule is that where a vendor's lien is expressly reserved the vendor has the superior title or right to the land as against the purchaser and those in privity with him until the purchase money is paid. To make a deed retaining a vendor's lien a perfect conveyance of title, the record must show the payment of the notes secured and a release of the lien."
>
> "(1079) bb. Nature of Vendor's Title. Deeds subject to the reserved lien are executory contracts in that the superior legal title remains in the vendor, and upon refusal of the vendee to pay he may have the actions permitted a vendor where title has not been conveyed. The vendor's title is superior to that of the purchaser in the sense that the purchaser cannot as-

> sert his title against the vendor unless he has paid the purchase money."

To the same effect see *27 Ruling Case Law— Vendor and Purchaser, section 376—Recovery of Possession in General p. 622.*

In Texas, as in other states in the case of a mortgage, the mortgagor, junior mortgagee or one holding under the original mortgagor has the right to have the mortgagee foreclose his mortgage and sell the property. In Texas in the case of a vendor's lien neither the vendee, a sub-vendee, or anyone else holding under the vendee can require the vendor to foreclose on and sell the property.

The distinction between the rights of the holder of a mere lien, whether by mortgage or otherwise upon a tract of land, and the rights of the holder of a vendor's lien and superior title is not familiar to lawyers and courts of other states. *Urban v. Bagby*, 286 S. W. 519, 524, (affirmed by the Supreme Court of Texas in 291 S. W. 537):

3. Rule the Same From 1846 to Date

In the second year of Texas statehood, the Supreme Court of the State in the case of *Browning v. Estes*, 3 Texas 462, 474, speaking through Chief Justice Hemphill, stated the rule to be:

> "The first point, then, for consideration is, whether a vendor can maintain an action for the recovery of lands against a vendee who has entered, with the assent of the vendor, into possession, but who has made default in the payments stipulated in the contract,

and which were conditions precedent to the execution of the conveyance to the vendee.

"The affirmative of this proposition seems now to be well settled law, and is sustained so abundantly by the authorities as to be placed beyond question.

"It is true that the possession of the vendee, who entered with the assent of the vendor, is lawful, nor can it be disturbed so long as he performes with fidelity the obligations imposed by the stipulations of the contract, and those which flow from the relation subsisting between the vendor and vendee. But the character of this possession is changed and becomes tortious, when the vendee disaffirms the contract, disavows the title under which he has entered, or refuses payment of the purchase money, or such portion as may be due, etc. etc., and then becomes liable, as a trespasser, to eviction, at the suit of the vendor."

On the second appeal of the above cited case, 11 Texas 237, the Supreme Court affirmed that "The vendor, in an executory contract, has superior right to the land, until the purchase money is paid."

There has never been, as far as we have been able to find after reading hundreds of cases, any deviation from this rule of substantive law, in any case in Texas. In fact in 1900 the Supreme Court of Texas in the case of *Farmers Loan & Trust Company v. Beckley*, 93 Tex. 267, 54 S. W. 1027, at page 1030, deliberately and with the greatest firmness, reaffirmed in the most positive terms, the rule in these words:

"The counsel for appellees vigorously attack the doctrine that the express retention of a lien in the deed

> or note for the purchase money makes the deed executory. The rule has been to long established and has become the basis of too many property rights, for the courts to overturn it. It is a rule to which persons may conform, and with which the profession is familiar. The legislature must deal with this question. if it is to be changed."

In this connection it should be noted that since the rendition of the decision in the *Farmers Loan & Trust Company v. Beckley* case the legislature amended the law so that when the purchase money debt became barred by limitation, the vendor may not recover the land or the debt Article 5520 R. C. S. But there was no purpose to nor was there any other change in the existing law. *Benn v. Security Development Company*, 54 S. W. (2) 146, application for writ of error refused; *Bunn v. City of Laredo*, 245 S. W. 426, affirming 208 S. W. 675.

4. The Texas Rule Was the Rule in the Fifth Circuit

The Fifth Circuit Court of Appeals has had this question before it several times and has shown a complete understanding of the Texas law and has followed it in each instance down to this case.*Burton et al. v. Dumestre* (C. C. A. 5) 86 F. (2) 947; *Hare et al. v. Henderson et al.* (C. C. A. 5) 113 F. (2) 277.

5. Vendor May Sell Land on Default of Vendee

The vendor's title is so paramount that immediately upon default in payment of the purchase price he may without notice to the vendee sell the land to some one else.

Thompson v. Robinson, 93 Tex. 165, 54 S. W. 245;

Evans v. Ashe, 108 S. W. 398, writ denied;

Roosevelt v. Davis, 49 Tex. 463;

Scott & Carmody v. Canon, 240 S. W. 304;

Rooney v. Porch, 239 S. W. 910;

Thompson v. Westbrook, 56 Tex. 265;

Mozoch v. Sugg, 254 S. W. 770;

43 Tex. Jur. 370, Sec. 210, 377 Sec. 213.

The purchaser is by the vendor's deed under the circumstances just stated vested with full title to the land with the right of possession, and may sue therefor in trespass to try title, which is strictly an action at law.

Lander v. Rounsaville, 12 Tex. 195.

6. Vendor Retains Superior Title

In the case of the sale of land by the owner, who retains an express vendor's lien to secure the purchase price, the vendor does not part with, but on the contrary, retains the superior title to the land. The vendee merely obtains as against the vendor the exclusive right of possession and use thereof so long as he complies with the terms of the executory contract of sale. In such case the vendee has "no title except one conditioned upon the discharge of his obligation for the purchase money." *Evans v. Ashe*, 108 S. W. 398, 401; *Adkins v. Harn*, 23 S. W. 28; *Efron, et al.*

v. Burgower, 57 S. W. 306; *Silverman v. Harman*, 250 S. W. 206.

7. Vendor, Owner of the Superior Title, Entitled to Possession, to Sue Therefor and for Title

The following cases by way of statement, or as a necessary result of the decision made, apply the law as we have stated it to be: That on the undisputed facts under the laws of Texas, Republic Insurance Company when this proceeding was begun and at all times since, was the owner of the superior title to the land involved and entitled to the possession thereof; and, further that the vendor is entitled to recover such possession in a suit of trespass to try title. Many of the cases cited note the fact that such a suit is not one of rescission, present or to establish an antecedent rescission, but one purely at law for possession:

The Howards v. Davis, 6 Tex. 174, 182;

Whiteman v. Castlebury, 8 Tex. 441, 443;

Harris v. Catlin, 53 Tex. 1;

Turner v. Phelps, 46 Tex. 251;

Dunlap v. Wright, 11 Tex. 597;

Ufford v. Wells, 52 Tex. 612;

Davis v. Roosevelt, 53 Tex. 305;

Foster v. Powers, 64 Tex. 247;

Peters v. Clements, 46 Tex. 114;

Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243;

White v. Cole, 29 S. W. 1148, writ refused in written opinion, 29 S. W. 759, 87 Tex. 500;

Mozoch v. Sugg, 254 S. W. 770;

Guevara v. Guevara, 280 S. W. 736;

Burgess v. Millican, 50 Tex. 397, 403;

Lanier v. Faust, 81 Tex. 186;

Weil v. Martinez, 124 S. W. 116, writ refused;

Pynes v. Dodd, 121 S. W. (2) 1045, writ refused;

Torres v. Black, 121 S. W. (2) 443, writ dismissed;

Solomon v. Skinner, 82 Tex. 345, 346;

Jackson v. Ivory, 30 S. W. 716;

Bolden v. Hughes, 107 S. W. 91;

Polk v. Kyser, 21 Tex. C. A. 676, 53 S. W. 87;

Lewright v. Reese, 223 S. W. 270, writ refused;

Milby v. Hester, 94 S. W. 178, writ refused;

Hudson v. Norwood, 147 S. W. (2) 826;

Hood v. Peoples Bldg. & Savings Ass'n, 27 S. W. 1046;

Rockhill Country Club v. Nix, 198 S. W. 155, 157, 158, writ refused;

Young v. Harbin Citrus Groves, Inc., 130 S. W. (2) 896, writ refused;

Walsh v. Ford, 66 S. W. 854, 27 Tex. (C. A.) 573;

Efron v. Burgower, 57 S. W. 306;

Toler v. King, 11 S. W. (2) 360;

Ezell v. Fowler, 20 S. W. (2) 1097;

Saunders v. Rawlings, 77 S. W. 41;

R. B. Spencer & Co. v. May, 78 S. W. (2) 665, writ refused;

Revard v. Wood, 156 S. W. (2) 561;

Sanders v. Kansas City Life Ins. Co., 152 S. W. (2) 506;

Crafts v. Daugherty, 69 Tex. 480, 6 S. W. 852;

Baumgarten v. Smith, 37 Tex. 439;

Graham v. Nicholson, 51 S. W. (2) 1053;

Stone Cattle & Pasture Co. v. Boon, 73 Tex. 548;

Curran v. Tex. Land & Mtge. Co., 60 S. W. 466;

Yett v. Houston Farm Development Co., 41 S. W. (2) 305, writ refused;

Johnson v. Smith, 115 Tex. 193, 280 S. W. 158;

McPherson v. Johnson, 69 Tex. 488, 6 S. W. 799.

8. Under Texas Law Appellee Can Obtain Title Only by Paying Entire Purchase Price

9. Rights of Vendor and Holder of Superior Title Distinguished From Those of Ordinary Mortgagee

The vital distinction under the laws of Texas between the rights of a vendor who retains an express lien on the land sold and the right of a mortgagee in the land, whether these latter rights be measured by the laws of Texas or other states, as pointed out in *Urban v. Bagby*, 286 S. W. 519, 291 S. W. 537, consists of this:

The mortgagee does not have any title to the land, and his sole right therein is to have the whole value of the land applied to his debt. Absent Bankruptcy, the mortgagee is entitled to have the land sold, and after crediting the sales price to the debt, to still hold the unpaid balance against the mortgagor, and then or later, if he can, collect it out of other assets of the debtor.

Bankruptcy can constitutionally relieve the mortgagor of personal obligation to pay the debt, but whether Congress could constitutionally do so or not, congress has not undertaken to provide that the entire value of the mortgaged property should not be realized on by the debtor, but to the contrary has provided, in effect, that the creditor's right is to have the value of his interest in the property applied to the debt. Congress has provided as one of the means of ascertaining the value of the property and has required that such value when so ascertained be so ap-

plied. It cannot be said where the only right the creditor has in the property is to receive the value and he receives it, that he has been deprived of any property. This is the extent of a mere mortgage interest in the property independent of Bankruptcy, and that right is not increased or diminished by Bankruptcy. But in cases of sales of land in Texas where a vendor's lien is retained the vendor's rights in the land are greater than those of a mere mortgage.

10. Neither Filing of Petition in Bankruptcy nor Discharge in Bankruptcy Can Affect Vendor's Right to Recover His Land If Purchase Money Not Paid

In *Bothwell vs. Farmers & Merchants State Bank & Trust Company*, 84 S. W. (2) 229, the Bank was permitted to recover the land notwithstanding Bothwell's discharge in bankruptcy, but because of such discharge in bankruptcy.

11. Holding of Circuit Court for Fifth Circuit in Glenn v. Hollums and Glenn v. Eaves, and of the Supreme Court in State Bank of Hardingsburg v. Brown Applicable Here.

It is not necessary under the cases heretofore cited and discussed for the vendor, the owner of the superior legal title to do more than execute a deed to another who becomes vested with the title and entitled to sue in trespass to try title or the vendor himself, may sue in trespass to try title.

The pleading and proof necessary for the recovery of title to and possession of land in the case of the superior title is as simple if not more so than the pleading and proof necessary to recover on title acquired at an execution sale as discussed by Judge Strum for this circuit in the cases of *Glenn et al v. Hollums* and *Glenn, et al, v. Eaves*, 80 F. (2) 555, black letter paragraphs 2, 3, 4, and 5 at pages 556 and 557. (See also *Federal Land Bank of Omaha v. Davis*, (C. C. A. 8) 128 F. (2) 435 for same rule in Iowa.)

Certainly by analogy the "equitable and superior title" discussed in the above opinion should have no more standing than the "legal and superior" title belonging to the vendor as previously illustrated.

The vendor can bring suit in trespass to try title under articles 7364, 7366, 7370, R.C.S. 1925, (See appendix p. 51, 52 for Articles 7364, 7366 and 7370). Republic Insurance Company sued by cross action in trespass to try title in the State court proceeding brought by Butts. (R. 18), and all the proof necessary is that the vendor was the owner and that the superior title was retained and that the purchase money has not been paid and the only defense would be for the vendee to plead and prove payment or tender all of the purchase money. *Young v. Harbin Citrus Groves Inc.* 130 S. W. (2) 896; *Bothwell v. Farmers & Merchants State Bank & Trust Co.*, 84 S. W. (2) 229.

12. Frazier-Lemke Act Is Unconstitutional If It Can Divest Title of Holder of Superior Title and Invest It In Vendee Who Disaffirms and Refuses to Pay Purchase Money.

Conceding the constitutionality of the amended Frazier-Lemke Act as applied to ordinary mortgages, *Wright v. Vinton Mountain Trust Bank*, 300 U. S. 440, 81 L. Ed. 736, it is unconstitutoinal if it deprives the holder of the superior title of that title.

Butts filed his original petition for composition and extension on June 12, 1940, (R. 18), and after filing his amended petition under section 75 (s) was adjudged bankrupt on August 24, 1940. (R-18). The three year stay under section 75 (s) (2) and (3) will expire at least by August 24, 1943. If on that date appellant refuses to accept the amount of the appraisal (R-19) then may it proceed to recover its title unless prevented by the Frazier-Lemke Act. If the act prevents appellant from recovering either its title or the full amount of the purchase money and permits the appellee to pay merely the appraised value if the act permits a reappraisal *(In re Wright v. Union Central Life Ins. Co.* 126 F. (2) 92) then it has been deprived of a more substantial right than was the creditor in *Louisville Joint Stock Land Bank v. William Radford*, 295 U. S. 554, 79 L. Ed. 1593, the case in which the United States Supreme Court declared the first Farm Debt Relief Act unconstitutional.

Under the Frazier-Lemke Act as it was first passed, which was declared unconstitutional in *Louisville Joint Stock Land Bank v. William Radford*, 295 U. S. 554, 79 L. Ed. 1593, Petitioner would here be deprived of more rights than was the Bank in that case.

In addition to the five constitutional rights of which the Bank was deprived in the Radford case, it is apparent that if the construction contended for by the debtor should be placed on the Amended Act at the present time, all of such five violations of the due process of law clauses of the Amendment to the Constitution of the United States would be presented, and at least two other constitutional rights granted to Republic Insurance Company under the fundamental law of the State of Texas, would be taken away. Thus, adopting all of the five quoted in the Radford case, the two additional violations are as follows:

6. Under the fundamental law of Texas, when land is sold and the vendor retains a lien in the deed to secure the payment of the purchase money, such also reserves in the grantor the superior title to the land, and if the purchase money be not paid, the vendor can sue for the title to and possession of the land and the only defense thereto would be the payment of the entire debt, principal, interest and attorney's feets.

7. Under the fundamental law of Texas, the retention in the vendor of the purchase money lien and of the superior title has the effect to keep the purchaser from

ever obtaining the superior title until all of the debt, principal, interest and attorney's fees is paid, and while a Federal Bankruptcy Act can have the effect of scaling down a debt or of discharging the Bankrupt entirely from his debt, it cannot and does not have the effect of permitting the debtor to secure the complete title unless he first pays all of the indebtedness.

When the Supreme Court of the United States upheld the Act, as amended, in *Robert Page Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia*, 300 U. S. 440, 81 L. Ed. 736, it indicated that because of the changes in the Amended Act to meet the situation which existed in the Act at the time the Radford case was decided such Act was made constitutional. As applied to the situation in the *Wright vs. Mountain Trust Bank case*, it must, therefore, be admitted that the Act is constitutional because the Supreme Court has said so. Under the situation that exists in this case, if the debtor is correct, the Act would be unconstitutional because it would deprive the appellant of exactly the same rights that the old Act did under the Kentucky law, and in addition, of at least two more vendor's rights.

We again seek to distinguish the position of the vendor who retains as express vendor's lien, under the law of Texas and from the decisions, from the mere lien holder, whether it be one by contract or statute.

In all cases of liens, the only interest that the creditor has in the property is to have the value thereof applied to the indebtedness which the lien secures. Theoretically, at least, the Act requires that this be done and provides the formula for doing so.

It has always been within the Constitutional power of Congress to discharge a bankrupt from his debts. It has always been assumed, both by Congressional enactments and by judicial construction, that Congress could not take away the right of the creditor in the bankrupt's property. In all cases of liens, his whole right is the application of its value to the payment of the debt in so far as it will do so. The Act in question recognizes this rule in providing for the lien holder to get the benefit of all the entire value of his security.

The first Frazier-Lemke Act was held unconstitutional because ". . . it effected a substantial impairment of the mortgagee's security." Quoting Justice Brandies in *Wright v. Vinton Mountain Trust Bank*, 300 U. S. 440, 457, 81 L. Ed. 736, 740 who assumed that where the effect of an act of Congress "was to deprive the mortgagee of his property without due process of law" it would be unconstitutional. It follows, therefore, that since the new Act, to be constitutional, must not do this, then the Act must be so construed as to not have that affect. In other words, it is not within the terms of the Act to deprive a vendor of his superior title or deprive him of the right to assert same.

The Act deals, according to its terms with mortgagees and not with superior title of vendors. Judge Brandies concludes his opinion therein, 300 U. S. 470, 81 L. Ed. 748, by upholding the second Frazier-Lemke Act. He uses these words: "For the reasons stated, we are of the opinion that the provisions of Sub-sections (s) make no unreasonable modifications of the mortgagee's rights; and hence are valid."

In *Wright vs. Union Central Life Insurance Company*, 304 U. S. 502, 517, 82 L. Ed. 1490, 1501, 1502, Judge Reed says:

> "The state law still establishes a norm to which Congress was substantially adherent; a serious departure from this norm, i. e. from the quality of the property rights created by the State Courts, has led to a condemnation of the Federal Act as constituting a deprivation of property without due process."

Even if the bankruptcy court has the power to suspend the exercise by Republic Insurance Company of its rights to repossess the property, we cannot see how it can be reasonably contended that the bankrupt court has the power to provide for any proceedings for Butts to obtain the title to the property without paying the entire purchase price. To do so would be to make an "unreasonable modification of Republic Insurance Company's rights," and to be a "serious departure from this norm, i. e., from the quality of the property rights created by the State Courts."

13. Section 75 (s) (3) Permits the Creditor to Have the Security for its Debt Sold Upon its Request for the Appointment of a Trustee and the Sale of the Property Ordered.

If Republic Insurance Company is denied its right to recover the land, then in the alternative of its other rights asserted it is certainly entitled to have a trustee appointed, and is entitled to have an order entered authorizing and requiring the trustee to sell at public auction the property involved.

Petitioner filed its motion in which one of its alternative counts was "5. That a trustee be appointed and authorized and required to sell, at public auction, the land so described", (R-7). In the petition for review the error of the referee in refusing to appoint a trustee was duly assigned. (Par. 7, R-13). The Supervising Conciliation Commissioner denied petitioner the right to have a trustee appointed and the property sold at public auction. (R. 37-44). The District Court also denies petitioner this right. (R. 21-22). Section 75 of the Bankruptcy Act, (Title 11, Sec. 203 U. S. C. A.) Subdivision (s) (3) provides as follows:

> "Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum in-

terest, into court, and he may apply for his discharge, as provided for by this title."

From the above references to the record it is obvious that if Republic Insurance Company does not have the superior legal title, and is relegated to the class of a mere mortgagee, that it is certainly a secured creditor such as is mentioned in the language quoted from the statute. It cannot be disputed that as such a creditor it requested both in its motion filed with the referee, and its petition for review of the orders made thereon, that the court order the property sold at public auction. It cannot be disputed that the law is mandatory. After an appraisal had been had and the value fixed by the appraisers appointed by the referee (even though done over the protest of the petitioner) (R-27), upon request of the petitioner the property must be sold by a trustee appointed by the United States Court. Republic Insurance Company may bid the full amount of its debt at such auction and the title of the purchaser at such auction can only be defeated by the debtor paying within 90 days the amount for which the property sells, together with 5 percent per annum interest into the court.

If the five year moratorium or stay under the original act was unconstitutional, *Louisville Joint Stock Land Bank v. William Radford*, 295 U. S. 554, 79 L. Ed. 1593, then it could hardly be contended that a three year stay or mortatorium under the new act with no right in the creditor to shorten that period would likewise be unconstitutional under that same case.

The case of *James M. Wright v. Union Central Life Insurance Company*, 311 U. S. 273, 85 L. Ed. 184, opinion by Mr. Justice Douglas had only recently been decided when this case was lodged in the District Court by the filing of the petition for review, same having been filed on January 13, 1941. (R-15). Both appellant and appellee in their briefs and argument before the Supervising Conciliation Commissioner argued that such case completely supported the contention of each, that is, of the petitioner that it was mandatory after an appraisal and an opportunity by the debtor to redeem, that the court appoint a trustee and order the property sold upon request of a secured creditor, and of the respondent that no trustee could be appointed in any event until after the expiration of three years from the adjudication of bankruptcy, and then only after the appellee had been given additional time within which to redeem at the appraised value.

While Mr. Justice Douglas's opinion in the *Wright v. Union Central Life Insurance Company* case is to us slightly confusing, nevertheless it was obviously an attempt by him to justify a means of denial to the secured creditor of the positive and mandatory right to the appointment of a trustee and a sale at public auction by resort to the other proviso which calls for an appraisal and the right to redeem.

There is some discussion in the opinion of the contention by the mortgagee that the mortgagor is not entitled to the right to redeem at the appraised value, or in fact to have

an appraisal at all, if he has disobeyed or failed to comply with the orders of the court. In the conclusions of law filed by the Supervising Conciliation Commissioner herein that language of Justice Douglas is twisted to mean that since Butts, the appellee in this case, has not been found disobedient to any order of the court that the *Wright v. Union Central Life Insurance Company case* removes the creditor's right to ask for the appointment of a trustee and the sale of the property.

We are sure that what Mr. Justice Douglas intended to hold and did hold was that even disobedience of the debtor and failure to comply with the orders of the court could not deprive him of the right to an appraisal or reappraisal and the right to redeem at the appraised or reappraised value and that the other language of the opinion with reference to the two provisos extensively discussed meant that after appraisal or reappraisal and failure to redeem, that the secured creditor could request the appointment of a trustee and the sale of the property, and that it was mandatory that the court follow such proviso, subject only to the right of the debtor to redeem within 90 days from such sale by paying the full amount of the sale's price, plus 5 percent interest into court, and further subject to the right of the creditor to bid the full amount of his debt at such sale.

The complete distinction of the *Wright v. Union Central Life Insurance Company* and the case made here was that Wright did not receive his appraisal, and right to redeem,

and Butts did request and receive an appraisal and has had more than two years in which to redeem, and has made no attempt or offer to do so. Whether or not the appellant would accept the appraised values does not appear, but unless Butts has tendered the appraised value within a reasonable time, which should certainly be less than two years, he should be in no position to insist that a trustee not be appointed when such is mandatory.

Further proceedings in the Wright case (see *in re Wright, Wright v. Union Central Life Insurance Company*, 126 F. (2) 92, C. C. A. 7), rehearing denied March 23, 1942, Certiorari denied 314 U. S. 670, 86 L. Ed. 536, show that Wright first executed his mortgage in 1915; that Wright and the insurance company have been involved in the Frazier-Lemke proceedings for eight years and the conclusion in that opinion is that the creditor has the right to a reappraisal as provided in the Act, and even though the debtor was there arguing that the Supreme Court had forbidden any further appraisal and had fixed the rights of the parties in the opinion by Mr. Justice Douglas, 311 U. S. 273, 61 Supreme Court, 198, 85 L. Ed. 184, the Circuit Court held that all the Supreme Court was attempting to do in that case was to give the debtor a chance to redeem and that the only issue was the creditor's right to a sale without first giving the debtor the right to redeem after an appraisal. The Circuit Court held the creditor entitled to a reappraisal by the same reasoning this Court should hold that the creditor, who after an appraisal

and failure by the debtor to redeem requests a sale under the mandatory provisions of the Bankruptcy Act, is entitled to have a trustee appointed and the property sold.

WHEREFORE, Petitioner, Republic Insurance Company, submits for the reasons assigned, both in the Petition for Writ of Certiorari and in this brief, that the Petition for Writ of Certiorari should be granted, and that upon hearing, the judgment and order of the Circuit Court of Appeals for the Fifth Circuit in this cause should be reversed, and the correct judgment here rendered.

Respectfully submitted,

J. L. SHOOK
Dallas, Texas
Attorney for Petitioner,

W. H. SHOOK
Dallas, Texas
Of Counsel.